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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 343

ANTHONY P. MILLER, INC., *Petitioner*

v.

THE UNITED STATES, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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OPINION BELOW

Anthony P. Miller, Inc., a Delaware corporation, plaintiff in the Court below, through its counsel, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above case on April 5, 1963.[1]

JURISDICTION

The judgment of the United States Court of Claims was entered on April 5, 1963; petitioner's motion for reconsideration of the Court's order dismissing plaintiff's petition was denied on June 7, 1963 (R. 180).

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[1] The opinion (R. 154) set forth in Appendix B (p. 15a), has not as yet been reported.

The jurisdiction of this Court is invoked under 28 U.S.C. 1255 (1).

QUESTIONS PRESENTED

1. Whether the respondent may lawfully and in good conscience interpose the claim of sovereignty, not for the purpose of precluding the expenditure of public funds in the payment of damages, but in order to unjustly enrich itself by retaining petitioner's bid deposit as liquidated damages for a contractual default, the default being directly due to the respondent's claimed act of sovereignty which impaired petitioner's ability to perform.

2. Whether in fact and law an increase initiated by the Department of Defense in the interest rate on Capehart housing project mortgages to the maximum rate of interest provided for by statute for such mortgages is a sovereign act for which respondent is not answerable for the impairment of petitioner's performance under its contract with respondent.

STATUTES INVOLVED

The "Capehart Act" housing legislation adopted under the Housing Amendments of August 11, 1955, 69 Stat. 635, and amended in certain respects by the Housing Act of 1956, 70 Stat. 1091, is codified in 12 U.S.C. 1748, et seq., and 42 U.S.C. 1594, et seq.

HOUSING FOR MILITARY PERSONNEL, 42 U.S.C. § 1594

Contracts for construction—Contract provisions; competitive bids

(a) The Secretary of Defense or his designee is authorized to enter into contracts with any eligible bidder to provide for the construction of urgently

needed housing on lands owned or leased by the United States and situated on or near a military reservation or installation for the purpose of providing suitable living accommodations for military personnel of the armed services assigned to duty at the military installation at or in the area where the housing is situated. Any such contract shall provide that each housing unit in the project shall be placed under the control of the Secretary of Defense, or his designee, as soon as the unit is available for occupancy as determined by the Commissioner. Any such contract shall also provide that, except for stock held by the Commissioner, the capital stock of the mortgagor (where the mortgagor is a corporation) be transferred to the Secretary of Defense, or his designee, when the housing has been completed as determined by the Commissioner. Any such contract shall contain such terms and conditions as the Secretary may determine to be necessary to protect the interests of the United States. Any such contract shall provide for the furnishing by the contractor of a performance bond and a payment bond with a surety or sureties satisfactory to the Secretary of Defense, or his designee, and the furnishing of such bonds shall be deemed a sufficient compliance with the provisions of section 270a of Title 40, and no additional bonds shall be required under such section. Before the Secretary shall enter into any contract as authorized by this section for the construction of housing, he shall invite the submission of competitive bids after advertising in the manner prescribed in section 152 of Title 41.

ARMED SERVICES HOUSING MORTGAGE INSURANCE, 12 U.S.C. § 1748 b, referring to the Commissioner of the Federal Housing Administration, provides:

(a) In order to assist in relieving the acute shortage and urgent need for family housing which

now exists at or in areas adjacent to military installations because of uncertainty as to the permanency of such installations and to increase the supply of necessary family housing accommodations for personnel at such installations, the Commissioner is authorized, upon application of the mortgagee, to insure mortgages (including advances on such mortgages during construction) which are eligible for insurance as hereinafter provided, and, upon such terms as the Commissioner may prescribe, to make commitments for so insuring such mortgages prior to the date of their execution or disbursement thereon: * * *

(b) (3) (C) * * * The mortgage shall provide for complete amortization by periodic payments within such terms as the Commissioner shall prescribe, but not to exceed thirty years from the beginning of amortization of the mortgage, and shall bear interest (exclusive of premium charges for insurance) at not to exceed 4½ per centum per annum of the amount of the principal obligation outstanding at any time. * * *

REGULATIONS

The regulations of the Federal Housing Administration, T. 24, Ch. II, subchapter M, parts 292a and 293a CFR (1949) sec. 292 a. 12; 24 CFR 803.12, (1962 Rev.), provided:

MILITARY AND ARMED SERVICES HOUSING MORTGAGE INSURANCE.

The mortgage may bear interest at such rate as may be agreed upon by the mortgagee and mortgagor, but in no case shall such interest rate be in excess of 4½%. Interest shall be payable in monthly installments on the principal then outstanding.

STATEMENT

Respondent, acting through the Corps of Engineers, United States Army, Department of Defense, issued an invitation for bids for the construction of seven Capehart Act-housing projects (R. 1; Appendix A, p. 1a). This invitation contained the following provision for the submission of deposits to accompany each bid (R. 157; Appendix B, p. 18a).

> 8. Each bidder is required to submit with his bid a certified check in the amount of 2 percent of the FHA estimated replacement cost but not to exceed $25,000 nor be less than $5,000, payable to the Treasurer of the United States, to insure that if he is the lowest acceptable bidder he will effect a closing with FHA within the time prescribed in the Letter of Acceptability. In the event the lowest acceptable bidder fails to effect a closing with FHA within the time prescribed, his deposit will be forfeited and become the property of the Department as liquidated damages unless the Department finds that he has made every effort to effect such closing and extends the time to effect such closing. If the lowest acceptable bidder effects a timely closing with the FHA the amount of his deposit will be refunded to him at the closing with the FHA. The deposits of unsuccessful bidders will be returned to them not later than 60 days after the opening of the bids. Each prospective bidder is advised that the failure to submit such certified check with his bid will render his bid defective and will be cause for its rejection.

Petitioner (termed the "Eligible Builder" in Capehart Act parlance) submitted the lowest bid for one of seven projects (R. 2; Appendix A, p. 2a), accompanied by the required bid deposit.

As provided for by the Capehart Act and by the terms of the invitation for bids for this project, the eligible builder was to provide from private sources the funds to finance the construction of the project by means of a mortgage to be insured by the Federal Housing Administration. The invitation for bids required that the mortgage be for a term of twenty-five years at an interest rate of 4¼% (R. 8; Appendix A, p. 7a). At the time of the issuance of the inviation for bids, the maximum mortgage interest rate provided for by the Act was 4½% (R. 11; Appendix A, p. 11a).

Respondent wished to defer the award of the contract to petitioner (to be made by issuance of a "Letter of Acceptability") and to make the award conditional upon respondent's receipt of an acceptable bid on an invitation to be issued for other contract work (R. 2; Appendix A, p. 2a). Respondent advised petitioner of this wish some 63 days after the bid opening date, and petitioner agreed to the award being so conditioned, after which respondent issued to petitioner a conditional Letter of Acceptability. Petitioner could not obtain a firm mortgage commitment while the respondent's Letter of Acceptability remained conditional (R. 3; Appendix A, p. 3a), and while the award of the contract to petitioner was still in the suspended, conditional state, the Department of Defense initiated an increase in the interest rate on Capehart housing project mortgages from 4¼% to 4½%. Since the statute permitted the payment of interest at the rate of 4½%, and under FHA regulation (p. 4, supra) a mortgage could bear any agreed-upon rate of interest not in excess of 4½%, no approval of the increase in the interest rate to 4½% by the Department of Defense was required, and the submission of the increase to FHA was merely a matter of departmental courtesy.

The imminence of this increase was known to the institutions engaged in mortgage financing, and thereafter when respondent received an acceptable bid for the other contract work and the condition was removed upon which the award of the contract to petitioner was suspended, petitioner was no longer able to obtain the required mortgage at the specified rate of 4¼% without payment of an exhorbitant discount for which petitioner could not be reimbursed (R. 3, 4; Appendix A, pp. 3a, 4a).

The interest rate to be paid on Capehart mortgages is a matter of direct financial concern to the Department of Defense for when a project is completed and the dwelling units are placed under the control of the Secretary of Defense, the Department then accepts from the escrow agent the assignment and delivery of the stock of the specially-formed mortgagor-builder corporation which executed the mortgage notes, and takes over the corporation and assumes the payment of the mortgage and the interest (R. 7-8; Appendix A, pp. 6a-7a).

Respondent refused to increase the interest rate for this mortgage to 4½% (R. 63), and upon petitioner's failure to provide at its own increased expense, the twenty-five year mortgage at the interest rate of 4¼% called for by the invitation for bids, respondent declared petitioner to be in default, readvertised the housing project for further bids at the interest rate of 4½%, and received an acceptable bid (R. 5; Appendix A, p. 4a).

But this project, as well as the other six projects included in the original invitation for bids, were cancelled by respondent for reasons not disclosed, and none was constructed (R. 5; Appendix A, p. 4a).

Notwithstanding the cancellation of the housing project, respondent declared petitioner's bid deposit forfeited as liquidated damages payable under the provisions of the invitation for bids (R. 4; Appendix A, p. 4a).

The petitioner's action in the United States Court of Claims was to obtain only the repayment of the amount of its bid deposit (R. 4; Appendix A, p. 4a).

REASONS FOR GRANTING THE WRIT

When a citizen deals contractually with his government it is understandable that a strong sense of injustice will obtain when his claim is that the contracting agency has obstructed his performance, retained his bid deposit as liquidated damages after the cancellation of the project, and the defense of sovereign immunity is interposed to prevent a return of his bid deposit.

But of more general importance is the widespread effect this precedent will have in the determination of the issues arising under the thousands of contracts entered into annually by the government, and the standards of conduct it establishes for the contracting agencies. Clarification is plainly in the public interest.

Petitioner urges that the lower court erred in adopting the commissioner's recommendations for granting respondent's motion for summary judgment, and holding as a matter of law that, upon the facts as alleged in the petition, the Department of Defense in providing for an increase in the mortgage interest rates for the Capehart housing projects constructed for the military services, was as the sovereign, performing a public act of general application for which it is not

answerable for the impairment to petitioner's performance of a particular undertaking to provide a mortgage for a Capehart housing project, under the rule of law as announced in *Horowitz* v. *United States*, 267 U.S. 458, 461, and decisions of the Court of Claims consistent therewith.

But in *Horowitz, supra*, and the other cases cited and relied on in the lower court's decision, claims for damages were being asserted against the government for increased costs incurred under contracts with the government, and the defenses interposed to the recovery of damages were that the acts complained of were the acts of the government as the sovereign, not the acts of the government as a party to the contract.

Here, however, petitioner is not seeking payment of damages from public funds. It is seeking only to recover the amount it deposited with respondent to provide assurance that it would enter into the housing contract if the award was made to it as the lowest bidder. Respondent is in the novel position of asserting the sovereignty of its act which impaired petitioner's ability to perform, by procuring a mortgage at the lower interest rate, as justification for the retention of petitioner's money. This is contrary to the standard of just conduct affirmed in *United States* v. *Peck*, 102 U.S. 64, in which the quartermaster's claim for offset of costs of reprocurement were denied where, due to military necessities, the claimant was prevented and hindered from performing his part of the contract.

Petitioner submits that the acts of the Department of Defense, as evidenced by the instructions issued to the military services (R. 13; Appendix A, p. 13a) was solely in its capacity as the agency charged with the

administration of Capehart housing projects. Certainly it cannot be seriously argued that the Department of Defense is charged with any governmental duty or authority to establish credit controls or to fix interest rates on mortgages for general public application.

The lower court further erred in holding that respondent is entitled to retain petitioner's bid deposit as liquidated damages for its failure to procure a mortgage at the lower interest rate specified in the invitation for bids, notwithstanding respondent's subsequent cancellation of all of the seven housing projects covered by the invitation for bids.

The lower court's approval of the rentention of petitioner's bid deposit, notwithstanding the cancellation of all of the projects, results in respondent's unjust enrichment.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition should be granted.

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